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Opinion No. 08-38

Constitutionality of HB3043: Constitutionality of video testimony from child victims

QUESTION

Proposed legislation would allow for the admissibility of a videotaped statement made by a child under the age of thirteen (13) years describing sexual contact or physical abuse if the court finds in a hearing outside the presence of the jury or in a hearing in juvenile court that the statement is nontestimonial in nature and would otherwise be admissible under the Tennessee Rules of Evidence. The legislation defines "nontestimonial" as statements made under circumstances objectively indicating that the primary purpose of the interview with the child is not to establish or prove facts for a subsequent criminal prosecution regardless of whether or not those statements are later used to establish or prove facts in a criminal proceeding. Is this proposed legislation constitutional?

OPINION

The constitutionality of the proposed legislation is vulnerable to attack under the Sixth Amendment to the United States Constitution as well as Article 1, § 9 of the Tennessee Constitution.

ANALYSIS

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Article I, § 9 of the Tennessee Constitution affords the accused even greater constitutional protection by establishing the right "to meet witnesses face-to-face." *See State v. Stephenson*, 195 S.W.3d 574, 591 (Tenn. 2006).

In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the United States Supreme Court ruled that out-of-court statements that are "testimonial" in nature by a witness absent from trial are inadmissible under the Confrontation Clause unless the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. It follows that the threshold question is whether the statement challenged is "testimonial." *State v. Lewis*, 235 S.W.3d 136, 143 (Tenn. 2007). The Tennessee Supreme Court has held that "testimony involves a formal or official statement made or elicited with a purpose of being introduced at a criminal trial." *State v. Maclin*, 183 S.W.3d 335, 346 (Tenn. 2006). Likewise, the United States Supreme Court has observed that out-of-court statements made to investigators are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Davis v. Washington, 126 S.Ct. 2266, 2274 (2006).

The proposed legislation defines "nontestimonial" in a manner that would allow for the admissibility of statements made by child victims to child protective services for the purpose of providing comprehensive protective services or for documenting the child's physical or mental condition. Other jurisdictions that have examined this scenario have arrived at different conclusions about whether this type of statement is testimonial. The Supreme Court of Minnesota examined a scenario where a child gave a statement to a nurse as part of an examination arranged jointly by a detective and a social worker and found this statement to be nontestimonial. *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007). The Supreme Court of Colorado likewise determined that a child's statements to a private actor of a child abuse assessment team were nontestimonial. *See People v. Vigil*, 127 P.3d 916 (Colo. 2006).

On the other hand, the courts of last resort for Iowa, Illinois, Maryland, Missouri, and North Dakota have all determined that statements made by a child victim to a private interviewer at a children's advocacy center are testimonial in nature. *See State v. Bentley*, 739 N.W.2d 296 (Iowa 2007), *petition for cert. filed*, 76 U.S.L.W. 3393 (U.S. Dec. 26, 2007)(No. 07-886); *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007); *State v. Snowden*, 867 A.2d 314 (Md. 2005); *State v. Justus*, 205 S.W.3d 872 (Mo. 2006); *State v. Blue*, 717 N.W.2d 558 (N.D. 2006).

Given this split of authority, it seems likely that the United States Supreme Court will at some point address the question of whether statements made by child abuse victims that are given for a primary purpose of seeking treatment rather than for use in a subsequent prosecution are "nontestimonial" for Confrontation Clause purposes. In fact, as noted above, Iowa recently filed a petition for writ of certiorari in the United States Supreme Court raising this precise issue in *State v. Bentley, supra*.

The legislature may define terms such as "nontestimonial" consistently with federal and state constitutional requirements. Since the constitutionality of the definition at issue in this legislation is, as yet, not conclusively resolved, this statute risks running afoul of the federal and state confrontation provisions. Should either the United States Supreme Court or the Tennessee Supreme Court find that such statements are, in fact, testimonial, the legislation would violate the Confrontation Clause.

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